

STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

Office of the Director
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
Tel: (415) 703-5050 Fax: (415) 703-5059/8

MAILING ADDRESS:

P. O. Box 420603
San Francisco, CA 94142-0603



January 28, 2005

Jennifer Badgley, Director
San Diego Public Works Task Force
P.O. Box 34535
San Diego, CA 92163-4535

Re: Public Works Case No. 2003-029
Energy Efficiency and Generation Work
San Diego Police Headquarters

Dear Ms. Badgley:

This constitutes the determination of the Director of Industrial Relations ("DIR") regarding coverage of the above-referenced work under California's prevailing wage laws and is made pursuant to title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the San Diego ("City") Police Headquarters energy efficiency and generation work ("Project") is a public work; however, City's chartered city status exempts the Project as a municipal affair from the payment of prevailing wages.

Factual Background

Government Code section 4217.10 authorizes local agencies to enter into energy conservation contracts with private entities in order to conserve energy and reduce energy operating expenses. This Section implements Public Resources Code section 25008, which articulates the policy of the state and the intent of the Legislature to promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources. On or about November 22, 1999, City and Onsite Energy Corporation ("Onsite") entered into a Master Agreement for Onsite to assess and furnish energy upgrades and improvements at various City facilities. Under the Master Agreement, Onsite prepares the scope of work for each facility, initially finances it, and performs the work. The cost of the work is to be repaid by City from guaranteed energy savings. Work at individual City facilities is to be executed by amendments to the Master Agreement.

This request involves the demolition of existing energy systems; the installation of energy upgrades, including a parking garage gas monitoring and control system, solar control film, lighting and control retrofit, a combined heat and power system/chilled water plant ("CHP"), an energy management system, a main HVAC supply/exhaust fan control upgrade, an uninterruptible power

00743

system ("UPS") and a 30 kW solar photovoltaic system; and the maintenance, repair and monitoring of the new systems at the San Diego Police Headquarters located at 1401 Broadway. The Project was authorized by City Ordinance of February 10, 2003 and effectuated pursuant to a Fourth Amendment to the Master Energy Conservation Services Agreement, also dated February 10, 2003, between City and Onsite.

City entered into a 12-year leasing contract with Onsite, under which City will pay Onsite 12 annual payments and an additional lump sum payment for the cost of the Project. The work was anticipated to cost not more than \$6,373,170.00 (City Manager's Report, January 22, 2003).

In addition to City's own funds, the Project has received and continues to receive funding from the following private sources:

- a self-generation incentive for a heat and power system from the San Diego Regional Energy Office ("SDREO")¹ in the approximate amount of \$510,000.00;
- • a photovoltaic buy-down incentive from SDREO in the amount of \$137,700.00; and
- • a standard performance contract incentive from San Diego Gas and Electric ("SDG&E") in the approximate amount of \$112,500.50.

The total amount of these incentives is approximately \$760,200.50. Onsite has received, and will continue to receive, these incentives on behalf of City. Onsite receives these incentives as an Applicant of the Self-Generation Incentive Program, and as Project Sponsor of the Standard Performance Contract Program.²

Self-Generation Program Incentives

The heat and power system and photovoltaic buy-down incentives derive from the SDG&E Self-Generation Program. Self-generation incentives are provided to encourage installation of new, qualifying self-generation equipment to meet all or a portion of

¹ SDREO is an independent public benefit non-profit 501(c)(3) corporation that is distributing the self-generation incentive funds of San Diego Gas and Electric, a regulated public utility and a subsidiary of Sempra Energy, a publicly-held corporation.

² Self-Generation Incentive Program Contract, January 18, 2003,* p. 1; Standard Performance Contract, January 13, 2003, p. 2.

the electric needs of a facility.³ "'Self-generation' refers to distributed generation technologies (microturbines, small gas turbines, wind turbines, photovoltaics, fuel cells and internal combustion engines) installed on the customer's side of the utility meter that provide electricity for a portion or all of that customer's load."⁴

The Self-Generation Incentive Program was created on March 27, 2001 by Decision 01-03-073 of the California Public Utilities Commission ("CPUC"), as required by Assembly Bill 970.⁵ Self-generation incentives are paid for by SDG&E ratepayers⁶ through electric distribution rates and gas rates.⁷ SDREO administers the program in providing the funding⁸ to program recipients.

Standard Performance Contract Program Incentives

The Standard Performance Contract Program rewards business utility customers who install energy-saving equipment based on actual kWh or therm savings achieved. Incentives from the standard performance contract program are financed by a public goods charge and demand-side management surcharge on utility bills.⁹ Sources of funding for standard performance contract incentives are contingent upon the type of incentive, whether gas or electric. This Project involves only electric incentives (2003 Standard Performance Contract Agreement, July 7, 2003). Funding for electric incentives comes from the "public goods charge," which is

³ "Self-Generation Incentive Program Handbook," San Diego Regional Energy Office, January 17, 2004, Rev. 4, p. 5.

⁴ CPUC Decision 01-03-073 (March 27, 2001), p. 4.

⁵ Among other things, Assembly Bill 970 added section 399.15 to the Public Utilities Code.

⁶ SDG&E ratepayers are located in San Diego County and parts of southern Orange County.

⁷ SDG&E funds the program by collecting costs in balancing and memorandum accounts until a formal ratemaking proceeding allows the costs to be recovered from SDG&E ratepayers. "Self-Generation Incentive Program Administrator Comparative Assessment," Itron, Inc. (prepared for Southern California Edison, September 2, 2003), pp. 4-11.

⁸ The payment process involves SDREO submitting project-specific invoice documentation to SDG&E for approval. Upon approval, the incentive is paid to SDREO from an SDG&E memorandum account. Once SDREO receives payment from SDG&E, SDREO deposits the money into its own account, and then issues a rebate check to the program applicant. "Self-Generation Incentive Program Administrator Comparative Assessment," Itron, Inc. (prepared for Southern California Edison, September 2, 2003), pp. 4-7.

⁹ "2002 Procedures Manual," PG&E, SDG&E, and So. Cal. Edison (April 8, 2002), Version 1.1, p. 1-1, which applies per the applicable Standard Performance Agreement.

paid for by SDG&E ratepayers.¹⁰ This program is administered by SDG&E and incentives are paid directly to program recipients.

On December 20, 1995, in Decision 95-12-063, the CPUC recommended that the Legislature enact a "public goods charge" to fund energy efficiency programs. This public goods charge was to apply to retail electric sales and be used to support energy efficiency costs. On September 23, 1996, Governor Wilson signed Assembly Bill 1890¹¹, which among other things, created the "public goods charge" to support public purpose programs. In Decision 97-02-014 (February 5, 1997), the CPUC established a non-bypassable charge on local distribution service, collected on the basis of usage. These funds were not to be commingled with other utility revenues. Each of the electrical utilities, including SDG&E, was required to identify a separate rate component for the funds, and to include funding for cost-effective energy efficiency and conservation activities. In Decision No. 98-04-063 (April 23, 1998), the CPUC authorized the Standard Performance Contract Program as a type of energy efficiency program to be funded by the "public goods charge."¹²

Analysis

1. The Energy Conservation Work Is Public Work Pursuant To Labor Code Sections 1720(a)(1) And 1771.

Under Labor Code section 1720(a)(1), "public work" is defined as "construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds" Section 1771 provides that maintenance work done under contract is public work. Section 1720(b) defines payment of public funds as the payment of money by a political subdivision of

¹⁰ This determination addresses only the sources of funding for electric incentives, since the work for which the incentives are based on this Project is electric. Gas incentives receive funding from different sources, which may or may not involve public funding.

¹¹ Assembly Bill 1890 was the bill that restructured the regulated electric industry.

¹² CPUC Decision 98-04-063 (April 23, 1998), p. 66 Interim Order, No. 2, and Attachment 2, "Policy Rules for Energy Efficiency Activities." See also, "Market Evaluation Study on the Impact of Standard Performance Contract Programs" by the National Association of Energy Service Companies, June 30, 2001, p. 7. On September 30, 2000, Governor Davis signed Assembly Bill 995, extending energy efficiency program funding from January 1, 2002 through January 1, 2012. In Decision 03-4-055 (April 17, 2003), the CPUC allocated \$5,760,000.00 to the SDG&E Standard Performance Contract Program for 2003, the year in which Onsite and City applied for incentives from SDG&E's Standard Performance Contract Program for work on this Project. Bridge funding for the public goods charge was provided between January 1, 2003 and March 31, 2003. CPUC Decision 03-010-038 (January 16, 2003), p. 13.

the state to a contractor. The above-described energy efficiency and generation work constitutes construction, demolition, installation, repair and maintenance work. The work is performed under contract. It is also paid for, in part, out of public funds for two reasons. City is making 12 annual payments and a lump sum payment to Onsite for the cost of the Project. This alone constitutes payment of public funds. In addition, however, although the incentive payments are from private sources and made to Onsite, City has assigned the incentive payments otherwise due City to Onsite. Thus, the Project is public work under Labor Code sections 1720(a)(1) and 1771.

2. The San Diego Police Facility Energy Conservation Work Is Not Public Work Pursuant To Former Public Utility Code Section 399.14(h).

You have asked whether former Public Utilities Code ("PUC") section 399.14(h) requires the payment of prevailing wages on the Project.

On September 12, 2002, Governor Gray Davis signed Senate Bill 1078 into law, effective January 1, 2003. Senate Bill 1078 required the application of prevailing wage laws to certain work performed on eligible renewable energy resources receiving production incentives or supplemental energy payments per former PUC section 383.5.¹³ This requirement was codified in former PUC section 399.14(h), which stated:

Construction, alteration, demolition, installation, and repair work on an eligible renewable energy resource that receives production incentives or supplemental energy payments pursuant to Section 383.5 including, but not limited to, work performed to qualify [sic], receive, or maintain production incentives or supplemental energy payments is "public works" for the purposes of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

San Diego Deputy City Attorney Frederick M. Ortlieb has represented that neither City nor Onsite has received production incentives or supplemental energy payments per former PUC section 383.5. Further, Mr. Ortlieb confirmed that the 30 kW solar photovoltaic system, the only energy conservation measure in the Project that might otherwise qualify as a "renewable energy resource," is not eligible for incentives or payments under former PUC section 383.5. The energy produced by these solar panels is used on-site, a use for which production incentives are not

¹³ Public Utilities Code section 383.5 has since been repealed by Stats. 2004, ch. 694, § 2.

available. PUC section 383.5 specifically denied funding eligibility for electricity that "is used onsite"¹⁴.

Thus, the Project is not a public works project pursuant to former PUC section 383.5.

3. The Energy Conservation Work Is Not Subject To Prevailing Wage Requirements As A Result of City's Chartered City Status.

City asserts that its chartered city status renders the Project exempt from the state's prevailing wage laws because the energy conservation work is a municipal affair. Under article XI, section V of the California Constitution, a city "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." The prevailing wage law does not apply to public works projects of a chartered city as long as the projects in question are "within the realm of 'municipal affairs.'" *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348.

City asserts that the police headquarters houses City's municipal Police Department, whose budget and operations are funded through local general fund revenues. City further asserts that the City's Police Department exists and operates pursuant to section 57 of the San Diego City Charter, which has ~~been~~ lawfully adopted pursuant to article XI, section 5 of the California Constitution. Section 57 of the City Charter provides, in relevant part:

The Chief of Police, with the approval of the City Manager, shall appoint, direct and supervise the personnel, subject to Civil Service regulation, have charge of the property and equipment of the department and exercise all powers and duties provided by general laws or by ordinance of the Council. The Chief of Police shall have all power and authority necessary for the operation and control of the Police Department.

City asserts that because police operations, including the energy budget used to make lease payments, are funded by municipal revenues, and the Police Department exists under the City Charter for the service and protection of the citizens of the City, the Project is a municipal affair.¹⁵

¹⁴ Former PUC § 383.5(c)(2)(D)(iii); Letter from Deputy City Attorney Frederick M. Ortlieb to DIR, dated September 4, 2003.

¹⁵ Letter of Mr. Ortlieb, dated September 4, 2003.

Under a project analysis of the chartered city exemption, the following factors are considered in determining whether a project is a municipal affair or implicates a matter of statewide concern: (1) the extent of non-municipal control over the project; (2) the source and control of the funds used to finance the project; and (3) the nature and purpose of the project. *Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115. Related to the nature and purpose of the Project are its geographical scope (*Young v. Superior Court of Kern County* (1932) 216 Cal. 512, 516-517) and its extra-territorial effects. *Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 771-774.

a. The extent of non-municipal control.

City has sole control over the Project. The City Ordinance authorizes and empowers the City Manager to execute, for and on behalf of City, the Fourth Amendment to the Master Energy Conservation Services Agreement related to the Project. City let the contract and will approve all work performed under it. Although CPUC, a state public entity, establishes the rules under which ratepayer funding is allocated to utilities for use in the incentive programs, it neither has control nor involvement in the Project funded by the incentives.¹⁶

b. The source and control of the funds.

The source of the Project's public funding are all City funds, both in the form of 12 annual payments and a lump sum to Onsite and the incentive payments, to which City is entitled to receive payment but instead directed that payment be paid on its behalf to Onsite to offset monies City owes to Onsite for the Project.

c. The nature and purpose of the work.

The nature and purpose of the Project lead to the conclusion that it is a municipal affair. First, it involves work on a city police facility. Longstanding decisional law holds that the organization, maintenance and operation of a police or fire department by a chartered city is a municipal affair. *Armas v. City of Oakland* (1933) 135 Cal.App. 411, 420; *Lossman v. City of Stockton* (1935) 6 Cal.App.2d 324, 332 (citations omitted); *Helbach v. City of Long Beach* (1942) 50 Cal.App.2d 242, 246. Closely related to the nature and purpose of a project is its geographic

¹⁶ In *City of Big Bear Waterline Reconstruction*, PW 93-029 (October 21, 1994), the Director found a public works project to be outside the purview of a municipal affair in part because the state had a substantial degree of involvement in the application, approval and ongoing monitoring of the project.

scope. When a project transcends a municipal boundary, the project ceases to be a municipal affair and comes under general state laws. *Wilson v. City of San Bernardino* (1960) 186 Cal.App.2d 603, 611. The Project is limited to the physical confines of the police headquarters facility at 14th and Broadway. When a project has extra-territorial effects, it also cannot be deemed a municipal affair. *Pacific Telephone and Telegraph Co.*, *supra*. Here, the Project involves improvements to a building housing the San Diego Police Department. These improvements may result in cost savings to City from a reduction in its utility bills but they have no discernable effects outside City.

Finally, determining the nature and purpose of a project can be aided by an examination of the relevant statutory law. For example, in *City of Big Bear Waterline Reconstruction*, PW 93-029 (October 21, 1994), the pipeline reconstruction was financed by a loan from the state established under the California Water Conservation and Water Quality Bond Law of 1986. The Bond Law expressed generalized statewide interests in the provision, protection and conservation of clean water. The Bond Law also provided a specific mechanism for achieving the state's objectives through the funding of construction projects relating to these objectives. Here, by contrast, the incentive programs were created under various legislative schemes separate from Public Resources Code section 25008, the general source of the state policy promoting energy conservation and alternative energy sources. Public Resources Code section 25008 arguably implicates a statewide interest generally relevant to this case. However, because this code section is neither the authority for the incentive programs that funded the Project nor a means of regulating any aspect of the Project, it does not in the end serve as a basis for finding the nature and purpose of the Project to be a matter of statewide concern.

In sum, because the operation of a city police department is traditionally considered a matter of purely municipal concern; the geographic scope and effects of the Project do not extend beyond the territorial boundaries of City; and the relevant statutory law does not support finding the Project to be a matter of statewide concern, I conclude that the nature and purpose of the Project is an additional factor in favor of finding the Project to be a municipal affair.

Conclusion

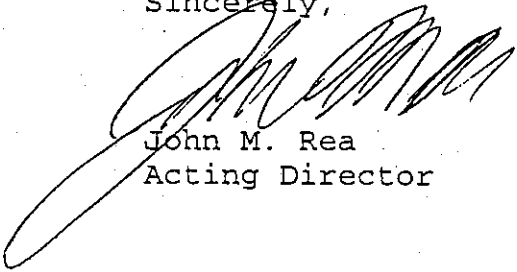
Under the facts of this case, the Project is a public work because it involves construction, demolition, installation, repair and maintenance work; it is performed under contract; and it is paid for with public funds. Because, however, the Project is

Letter to Jennifer Badgley
Re: Public Works Case No. 2003-029
Page 9

controlled by City, is paid for with City funds and is of a local nature and purpose, the Project is purely a municipal affair and therefore exempt from the requirement to pay prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director

00751